STATE OF MICHIGAN

COURT OF APPEALS

SHARON BARNES and TIM BARNES,

Plaintiffs-Appellees,

v

DR. IVANA VETTRAINO, DR. WILLIAM BLESSED, PROVIDENCE HOSPITAL and MICHAEL ROTH, M.D.,

Defendants-Appellants,

and

JANE DOE,

Defendant.

UNPUBLISHED
March 25, 2003

No. 235357
Oakland Circuit Court
LC No. 00-022089-NH

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

This matter is before the Court on order of the Supreme Court to consider, as on leave granted, a trial court order denying defendants' motion for summary disposition.[1] We affirm.

Plaintiff Sharon Barnes learned she was pregnant in the spring of 1998. She saw defendant Roth for prenatal care, and he gave her a February 25, 1999 due date. He also recommended an amniocentesis because plaintiff Sharon Barnes was thirty-six years old. Due to delays caused by medical complications, as well as defendants' alleged negligence in diagnosing and reporting the test results, plaintiffs did not learn that the baby would have various birth defects until November 1998. Plaintiffs elected to have the fetus aborted, but had to travel out of state for the procedure, which was marked by complications. Plaintiffs filed this action for damages.

Defendants moved to dismiss under MCR 2.116(C)(8), asserting that this Court's ruling in *Taylor v Kurapati,* 236 Mich App 315; 600 NW2d 670 (1999), which abolished a cause of

[1] *Barnes v Vettraino,* 464 Mich 876; 630 NW2d 625 (2001).

action for wrongful birth,[2] effectively eliminated any cause of action based on the negligent diagnosis and reporting of test results affecting abortion decisions. The trial court disagreed, finding that the fact that plaintiffs were not seeking damages for the life of an unwanted child was a sufficient basis on which to distinguish *Taylor*. Thus, the trial court denied defendants' motion for summary disposition.

We denied defendants' request for leave. However, as noted above, our Supreme Court remanded the matter to us for consideration as on leave granted.

Generally, we review de novo a trial court's ruling on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The *Beaudrie* Court added:

> A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Id.* at 129-130.]

"All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Madejski v Kotmar Ltd*, 246 Mich App 441, 444; 633 NW2d 429 (2001).

The general rule in Michigan is that a plaintiff may recover civil damages for medical malpractice, assuming, of course, that the plaintiff satisfies his or her evidentiary burdens. MCL 600.2912a. Thus, a plaintiff may recover by proving that a medical professional's treatment deviated from a recognized standard of care and proximately caused a compensable injury. MCL 600.2912a.

In *Taylor*, we narrowed the scope of compensable injuries by abolishing the so-called "wrongful birth" cause of action. *Taylor, supra* at 355-356. We noted the difficulty in determining a proper damages award in a wrongful birth case:

> This rule invites the jury in wrongful birth cases to weigh the costs to the parents of a disabled child of bearing and raising that child against the benefits to the parents of the life of that child. This rule thus asks the jury to quantify the unquantifiable with respect to the benefits side of the equation. Further, to posit a specific question: how does a jury measure the benefits to the parents of the *whole life* of the disabled child, when the potential of that child is unknown at the time of suit? How, for example, would a hypothetical Grecian jury, operating under Michigan jurisprudence, measure the benefits to the parents of the *whole life* of Homer, the blind singer of songs who created the *Iliad* and the *Odyssey*? Absent the ability to foretell the future and to quantify the value of the spoken and then the written word, how, exactly, would the jury do that? [*Id.* at 349.]

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[2] The Legislature has since abolished claims for wrongful birth, wrongful life, and wrongful conception, except in cases involving an intentional or grossly negligent act or omission. MCL 600.2971.

In addition, we noted that continuing to recognize the "wrongful birth" cause of action could lead down a "slippery slope" to the logical conclusion that a "defective child," once born, should not be allowed to continue living. *Id*. at 349-355.

Here, as noted above, defendants contend that the *Taylor* decision prohibits any cause of action based on the negligent diagnosis and reporting of test results affecting abortion decisions. Defendants contend that the duty, breach, and causation elements of plaintiffs' cause of action are the same as that in wrongful birth claims. In other words, because defendants failed to provide timely information about the condition of the fetus, plaintiffs' ability to make a timely reproductive decision was adversely affected.

However, even accepting defendants' argument, we note that the damages element alone distinguishes the instant matter from a "wrongful birth" cause of action. Here, plaintiffs are not asking a jury to "quantify the unquantifiable." See *Taylor*, *supra* at 349. Instead, plaintiffs are seeking to recover "garden-variety" medical malpractice damages, including economic losses.[3] Moreover, we are not persuaded that the *Taylor* decision eliminates *any* cause of action alleging medical malpractice involving an abortion decision. Rather, it represents our reasoned conclusion that we will not invite juries to weigh the "cost" of a child being born against the lost "benefit" of the child not being born. Accordingly, we conclude that the trial court did not err in finding the instant matter to be distinguishable from *Taylor*.[4]

Further, we disagree with our dissenting colleague's suggestion that our ruling recognizes a "wrongful infliction of abortion" cause of action. Our ruling merely establishes that the *Taylor* exception to general medical malpractice principles does not apply where, as here, the jury is not being asked to compensate a parent for damages based on the birth of a disabled child. The dissent's suggestion is also factually inaccurate, inasmuch as plaintiffs are not seeking to recover for a "wrongful infliction of abortion."[5] Rather, they are seeking medical malpractice damages for economic and non-economic losses attributable to a medical provider's purported negligent diagnosis and treatment. That these losses arose in the context of an abortion does not prevent the plaintiffs from pursuing compensation. Indeed, if plaintiffs' allegations of negligence

[3] We disagree with our dissenting colleague's concern that the jury would be required to "necessarily weigh and offset any pain and suffering that was avoided in not giving birth to a potentially impaired child." Plaintiffs' claim presumes that, given the fetus' problems, an abortion would have taken place in any event, even if defendants had not been negligent. If anything, the jury would merely be asked to weigh the difference between the pain and suffering actually incurred, and the pain and suffering that would have been incurred in connection with a much earlier abortion. We are not persuaded that weighing these damages is meaningfully different from what juries are routinely asked to do in a variety of legal claims. More importantly, unlike *Taylor*, this case simply does not require the jury to quantify the unquantifiable—that is, the value of a human life.

[4] The instant matter is also distinguishable from our Legislature's abolishment of "wrongful birth," "wrongful life," and "wrongful conception" causes of action. Here, there is no allegation that defendants' purported negligence caused or contributed to either a pregnancy or birth.

[5] In fact, the concept of a "wrongful infliction of abortion" should probably be reserved for cases where a medical provider's misfeasance improperly causes an abortion. It seems inapplicable where, as here, the patient knowingly obtained an abortion.

involved, for example, delayed diagnosis of a kidney ailment, we would certainly not preclude an attempt to recover. In other words, we believe that the instant matter falls sufficiently within the scope of an ordinary medical malpractice claim, and sufficiently outside the scope of a wrongful birth action, to allow plaintiffs' cause of action to proceed. Therefore, we affirm the trial court's decision denying defendants' motion for summary disposition.[6]

Finally, we note that defendants also argue that plaintiffs' cause of action is somehow barred because abortion is illegal in Michigan. This issue was not raised and addressed below, and, thus, has not been preserved for appeal. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). Consequently, we decline to consider it.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh

[6] We agree that Michigan law "makes a value judgment favoring childbirth." See *Taylor, supra* at 347. However, we would hope that, at the very least, Michigan law also favors the prompt disclosure of medical information—even where disclosing that information is contrary to the health care provider's personal interests. We further note that, if defendants' argument is accepted, a health care provider could avoid liability by not informing a patient about a mistaken diagnosis until the fetus reached viability. On the other hand, there is merit to our dissenting colleague's concern that our opinion would allow a health care provider to avoid liability by not ever informing the patient about a mistaken diagnosis. Of these two concerns, we believe that the latter involves a substantially greater ethical violation that would, hopefully, be less likely to occur. Moreover, it is plausible that such conduct would fall within our Legislature's statutory exception to its abolishment of the "wrongful birth" cause of action as an "intentional or grossly negligent act or omission." MCL 600.2971. Regardless, we should not be intimidated into precluding recovery based on the concern that another party may resort to unethical measures to avoid liability for similar actions in the future.